No. 92-1065

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

JAMES ROGERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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December 15, 1992.

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QUESTIONS PRESENTED

Petitioner James Rogers was convicted by an Eastern District of Michigan jury of all counts of an indictment charging one count of conspiracy to distribute controlled substances and various counts of distribution of controlled substances in violation of 21 U.S.C. 841(a)(1), 846. The Lower Court sentenced the petitioner to 87 months imprisonment. Defendant appealed by right and the Sixth Circuit affirmed.

The substance of the government's case was that during an eight or nine month period in 1988, Rogers, at his pharmacy in Mt. Clemens, Michigan, knowingly filled 23 phony prescriptions for Dilaudid, Tylenol IV and Percodan. These prescriptions were all written in the name of the same doctor, were for five different patients and were all dispensed to government witness, George Thomas. Mr. Thomas had been under investigation for

some time and was stopped by special agent for the FBI Robert S. Barenie after Mr. Thomas had been to the Petitioner's place of business. After discussing the stop with the agents, Mr. Thomas agreed to go by to the Sun Pharmacy with a prescription and some cash furnished by Agent Wilson and Agent Barenie to purchase a controlled substance. Prior to this buy, Mr. Barenie had obtained an executed administrative subpoena issued by Anthony Riggio requesting any and all prescriptions from January, 1985 to the present, all orders and invoices for Schedule II drugs and DEA 222 forms plus other materials for Sun Pharmacy. After the "buy" was accomplished Special Agent Barenie served the subpoena on Petitioner and obtained both documentation and other information from the Petitioner.

Subsequent to the time charges were

filed against Petitioner, Petitioner brought a motion to suppress evidence obtained by the administrative subpoena which was actually an illegal search carried out in derogation of the Fourth Amendment of the United States Constitution. The motion was to suppress 23 prescriptions for Dilaudid, invoices and DEA form 222 which were marked as government exhibits 2 at the time of trial which formed the basis for indictment. The Trial Court declined to accept the Fourth Amendment arguments and further ruled that Defendant Rogers had voluntarily complied with the subpoena. However, both the Trial Court and the United States Sixth Circuit Court of Appeals appeared to compare the case to the use of administrative warrant rather than an administrative warrant, notwithstanding that there is no

requirement for a showing of probable cause in any form for the issuance of a subpoena. Further, the Court apparently felt that consent to a subpoena some how transfers to consent to a search.

A verdict was returned against Defendant Rogers on July 11, 1991 in part based on the use of the prescription forms illegally seized. Post trial, a pre-sentencing report was prepared and submitted based on a conversion of the Percodan, Dilaudid and Tylenol IV to 548.005 grams of heroine equivalent or base offense level of 28. This was done without any evidence of the actual weight of the Percodan or Tylenol IV tablets sold and by taking the total weight of the tablets rather than the active ingredient, which totaled 7 grams. Defendant objected and produced the testimony of a pharmacist regarding the

carrier weight as well as Defendant's inability to affect the actual weight of the tablet. The Trial Court ruled that 21 U.S.C. Section 841 in the sentencing guidelines required the basic offense level should rest on the weight computation used by the probation department although the Court did award departure of 10 months.

These facts raise these questions:

I.

DID THE LOWER COURT ERR IN ADMITTING EVIDENCE OBTAINED PURSUANT TO AN ADMINISTRATIVE SUBPOENA WHICH VIOLATED DEFENDANT-PETITIONER'S RIGHTS UNDER THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

A. DID THE TRIAL COURT IMPROPERLY DETERMINE THAT THERE HAD BEEN A CONSENT TO SEARCH?

II.

DID THE COURT ERR IN CALCULATING DEFENDANT-PETITIONER'S SENTENCE ON THE TOTAL WEIGHT OF THE PHARMACEUTICALS RATHER THAN THE WEIGHT OF THE ACTIVE INGREDIENT WHICH WOULD HAVE JUSTIFIED A GREATER DOWNWARD DEPARTURE?

LIST OF PARTIES

The names of all parties appear in the caption.

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REPORTS OF OPINIONS

The United States Court of Appeals, Sixth Circuit, per curium opinion is reproduced in the Appendix at pages App. 1 through App. 12. It has not been published. The District Court Judgement is attached in the Appendix at pages App. 13 through App. 16.

STATEMENT OF JURISDICTIONAL GROUNDS

The Court of Appeals entered its decision on September 9, 1992. This petition has been filed within 90 days of that date.

Petitioner invokes this Court's jurisdiction under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment of the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized." Id.

SENTENCE GUIDELINES INVOLVED

Sentencing Guidelines, Section 2D1.4 provides:

> Unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance. If a mixture or substance contains more than one controlled substance, the weight of the

entire mixture or substance is assigned to the controlled substance that results in the greater offense level. The terms "PCP (actual)" and "Methamphetamine (actual)" refer to the weight of the controlled substance, itself, contained in the mixture or substance. For example, a mixture weighing 10 grams containing PCP at 50% purity contains 5 grams of PCP (actual). In the case of a mixture or substance containing PCP or methamphetamine, use the offense level determined by the entire weight of the mixture or substance, or the offense level determined by the weight of the PCP (actual) or methamphetamine (actual), whichever is greater.

Sentencing Guidelines, Section 3B1.3 provides:

> **Abuse of Position of Trust or Use of Special Skill**
>
> If the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, increase by 2 levels. This adjustment may not be employed if an abuse of trust or skill is included in the base offense level or specific offense

characteristic. If this adjustment is based upon an abuse of a position of truest, it may be employed in addition to an adjustment under Section 3B1.1 (Aggravating Role); if this adjustment is based solely on the use of a special skill, it may not be employed in addition to an adjustment under Section 3B1.1 (Aggravating Role).

18 U.S.C. Section 3553(a) provides:

Imposition of a sentence

(a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed--

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for the applicable category of the offense committed by the applicable category of defendant as set forth in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C.994(a)(1) and that are in effect on the date

the defendant is sentenced;

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

CONCISE STATEMENT OF THE CASE

Defendant James Rogers, a licensed Michigan Pharmacist was convicted by a jury from the Eastern District of Michigan of all counts of an indictment charging one count of conspiracy to distribute controlled substances and various counts of distribution of controlled substances in violation of 21 U.S.C. 841(a)(1), 846. The Lower Court sentenced Petitioner to 87 months imprisonment. The case was initially appealed to the Sixth Circuit Cour of Appeals and all findings were affirmed. Petitioner now applies for certiorari.

The substance of the government's case was during an eight or nine month period in 1988, Petitioner at his pharmacy in Mt. Clemens, Michigan allegedly knowingly filled 23 phony prescriptions

for Dilaudid, Tylenol IV and Percodan. These prescriptions were all written in the name of the same doctor, were for five different patients and were all dispensed to government witness George Thomas. At the time of trial Mr. Thomas had already pleaded guilty to a number of counts and was awaiting sentencing.

According to Mr. Robert S. Barenie, a special agent with the Federal Bureau of Investigation, Mr. Thomas had been under investigation for a considerable period of time. Mr. Thomas was observed entering a pharmacy (the Petitioner's place of business) then exiting sometime later. On Mr. Thomas' drive back to Detroit, he was stopped by an agent and the stop discussed. At that point, Mr. Thomas agreed to go back to the Sun Pharmacy with a prescription and some cash furnished and marked by the agents to purchase a

controlled substance. Mr. Thomas proceeded to the Sun Pharmacy and allegedly purchased controlled substances. The remaining money plus the substance was turned over to the Federal Agents.

Prior to the occurrence of the "buy", Mr. Barenie had obtained an executed administrative subpoena issued by Anthony Riggio, requesting any and all prescriptions from January, 1985 to the present, all orders and invoices for Schedule II drugs and DEA 222 forms plus other materials from Sun Pharmacy. This subpoena is attached as App. 17 of the Appendix. There has been no testimony as to the date, time or circumstances of the issuance of this subpoena and certain information has been left blank. However, according to Special Agent Barenie, the Petitioner whose full name appears on the subpoena was a suspect in a criminal

investigation prior to the time of the service of the subpoena of September 2, 1988. It is interesting to note that the subpoena requires that the documents be produced by the Petitioner at 477 Michigan Avenue, 26th Floor, Detroit, Michigan on that date at 11:00 a.m.

However, this was served on the Petitioner and the agent informed him that he expected that the documents be produced at that time. It is further interesting to note that the agent entered the pharmacy at 10:00 a.m. an hour in advance of the time set for production of documents.

Prior to the time of trial the Petitioner brought a motion to suppress the evidence obtained by the administrative subpoena which was actually an illegal search in violation of the Fourth Amendment of the United States

Constitution. This represents a significant portion of the evidence which includes 23 prescriptions for Dilaudid, invoices and DEA form 222 which were marked as government's exhibit 2 at the time of trial which formed the basis for the indictment. Petitioner argued that this evidence should be suppressed as the product of an illegal search as the use of an administrative subpoena as the substitute for a search warrant where the agent was already aware that the Petitioner was a target of the investigation was improper. There was no opportunity for a neutral and impartial magistrate to review the evidence and to determine probable cause to seize documents or other evidence. Further there could be no consent in this matter as any compliance was with the subpoena, not with a warrantless search.

The Court declined to accept the Fourth Amendment argument and further ruled that the Petitioner had voluntarily complied with the subpoena. Notwithstanding the lack of testimony from even the special agent as to what occurred, the Court apparently believed that if the records were produced, there was prima facie consent. On July 11, 1991 the jury returned a verdict of guilty on counts 1 through 21 of the indictment against Petitioner. During the course of the post trial proceedings, a pre-sentencing report was submitted by Barbara A. Feril, United States Probation Officer to the Court and counsel. In part E of the Presentencing Report attached hereto in pages App 18 through App. 30 of the Appendix, the equivalent conversion for the alleged Percodan, Dilaudid and Tylenol IV sold by Petitioner was 548.005 grams of

heroin the equivalent of a base level offense of 28. This was based on 1102 milligrams of Dilaudid tablets, 1204 milligrams of Dilaudid tablets plus Percodan and Tylenol IV tablets. Objections were filed on two grounds; first that there had never been any testimony or evidence produced as to the weight of Percodan or Tylenol IV and second that the base level offense suggested by the probation department relied on the total weight of the tablets sold rather than the net weight of the active ingredient.

At the time of sentencing Petitioner produced the testimony of a licensed pharmacist who testified that medication per se is sold on units of medicine which designates the active ingredient, not the total weight of the entire product and that the balance of the tablet constitutes

a pharmaceutical dose. The point of formulating a tablet is in fact to reduce their solubility to prevent abuse. Further, Mr. Pensak testified that there is nothing that a pharmacist could do to affect the purity of the tablet as the manufacture formulates and distributes discrete units which are then dispensed by the pharmacist.

The Court stated that the construction of 21 U.S.C. Section 841 and the sentencing guidelines require that the basic offense level applicable to the Petitioner must rest on the weight computation used by the probation department taking into account the entire weight of all dosages rather than the active ingredients. Although the Court did award a downward departure from the sentencing guidelines, which is discretionary to the Trial Court, this

represented only 10 months off the guideline minimum of 97 months. Neither the Trial Court nor the Sixth Circuit Court of Appeals on appeal considered that no weight was ever presented for the Tylenol IV or Percodan tablets by the probation department.

An appeal as of right was filed in the Sixth Circuit. A copy of the Sixth Circuit's per curium opinion is attached hereto. The Sixth Circuit, relied on the case of U.S. v. Acklan, 690 F.2d 70 (6th Cir. 1982) analogized the instant case to that the use of an administrative inspection warrant as opposed to a criminal warrant. The Court further found that as the judicial probable cause requirements did not apply to administrative warrants, the findings of Acklan did not mandate a different result.

Further, the Sixth Circuit found that the Trial Court's finding of consent was supported by the record as the Petitioner voluntarily cooperated with production of documents for the subpoena. Equally, the Court found that a further downward departure was not justified pursuant to the case of United States v. Chapman, 111 S.Ct. 1919, 1925 (1991).

This petition followed.

ARGUMENT AND REASONS FOR ALLOWANCE OF WRIT

I. THE LOWER COURT ERRED IN ADMITTING EVIDENCE OBTAINED PURSUANT TO AN ADMINISTRATIVE SUBPOENA WHICH VIOLATED PETITIONER'S RIGHTS UNDER THE FOURTH AMENDMENT.

Protections provided by the Fourth Amendment to United States Constitution and the operation of the exclusionary rule apply to searches of businesses as well as homes. As stated in See v. Seattle, 387 U.S. 541, 543 (1967), "The business man, too, has that right placed in jeopardy with the decision to enter and inspect for violation of regulatory laws can be made and enforced by an inspector in the field without official authority evidenced by a warrant." Id at 543. See, Marshall v. Barlows, Inc. 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 91978). As stated in Katz v. United States, 389 U.S. 347, 357, 88 S.Ct. 507, 514 L.Ed.2d 576 (1967):

> The Fourth Amendment prescribes all unreasonable searches and seizures and it is the cardinal principal that `searches conducted outside the judicial process, without prior approval by the judge or magistrate, are per se unreasonable under the Fourth Amendment - subject to only a few specifically established and well delineated exceptions.'" Id. See, Horton v. California, 110 S.Ct. 2301 (1990).

Here, Federal Agents carried out a search and seizure of specific documents on an individual that they suspected of criminal activity, not pursuant to a search warrant subject to approval by a judge or magistrate or even an administrative warrant subject to a somewhat lesser degree of probable cause but pursuant to an administrative subpoena which lacked any of the guarantees inherent in the Fourth Amendment proceedings. The subpoena which was served on the Petitioner did not require the review of an impartial magistrate in

any form. Pursuant to 21 U.S.C. 876, a copy of which was attached to the subpoena at issue, the attorney general issues a subpoena to compel the attendance and testimony of witnesses and requires the production of any records which the attorney general finds relevant or material to the investigation. No where is the issuance of this type of subpoena premised on the determination of probable cause in any quantity by a neutral and detached magistrate.

The danger presented is, of course, what happened here. The government had sufficient time to collect information with regard to Mr. Thomas' activities and even to obtain marked and specific funds for a controlled buy. There was even sufficient time to obtain the subpoena. But rather than obtaining a search warrant or even an administrative search warrant,

a subpoena was obtained requiring the production of specific documents at 11:00 a.m. on September 2, 1988 at an address in Downtown, Detroit. The subpoena was served an hour before the time that the documents were to be produced and the documents were demanded by the agent forthwith. At least two District Court cases have recognized that the use of investigative warrants for administrative inspections under 21 U.S.C. Section 880 lack Fourth Amendment guarantees that are required by a search warrant. In U.S. v. Lawson, 502 F.Supp. 158 (MD 1980) the Maryland District Court found that the use of an administrative warrant to obtain evidence for a criminal prosecution was improper and that the government could constitutionally enter the premises only on securing the warrant fully supported by probable cause. Id at 165. See, Michigan

v. Tyler, 436 U.S. 499, 508, 512, 98 S.Ct. 1942, 1949, 1951, 56 L.Ed.2d. A similar conclusion was reached in U.S. v. Anile, 352 F. Supp. 14 (MD, WV, 1973). In that case, an administrative inspection pursuant to a warrant under 21 U.S.C. Section 800 was carried out after the DEA received complaints about the Defendant's activities in the pharmacy. The Court in that case had no doubt that the possibility of criminal prosection was the sole reason for the agents initial visit to search the business.

The parallel to the instant case is unmistakable. Petitioner was the subject of a criminal investigation and there is no evidence to indicate that the government's purpose was other than to pursue an investigation of which James Rogers was the focus. There is no attempt to even obtain an administrative warrant

for inspection rather than a subpoena. The method used by the federal agents lacked even the most rudimentary review for the existence of probable cause. During the course of the evidentiary hearing, the Trial Court determined that the case at issue was almost identical to U.S. v. Herrington, 761 F.2d 1482 (11th Cir. 1985). However, once again the Herrington case involved the use of an administrative warrant, not a subpoena. In this case, a properly obtained search warrant was extended during the course of the search by a telephone call to the magistrate. Further items were seized as "in plain view". The facts of this decision obviously do not accord with instant case where there was no warrant in any form issued and no involvement of a magistrate at any point during the period.

The Herrington case also addresses the use of the administrative subpoena issued under 21 U.S.C. Section 876 between indictment and trial. In this case, the subpoenas were served on third parties during a continuing investigation and the court found as such, the searches were entirely legal. Id at 1485. However, the Court's decision that "we agree with the decisions in both the two cases that the DEA may issue subpoenas under section 876 in an ongoing investigation so long as they are not to run against the targeted individual" demonstrates the inapplicability of this ruling to the instant case. Here, the administrative subpoena was served and enforced against the target of the investigation; the Petitioner. There is no question that the government had already targeted Mr. Rogers as the person they intended to prosecute

for the sale of Schedule II substances. As such, all evidence, including the prescriptions, DEA Form 222 and other materials as well as the statements made to Mr. Barenie, should have been suppressed in the original motion.

On appeal, the Sixth Circuit Court of Appeals apparently disregarded the arguments presented in U.S. v. Herrington, supra, as well as the Trial Court's reliance on this analysis. Instead, the Sixth Circuit, apparently believes that the case of U.S. v. Acklan, 690 F.2d 70 (Sixth Cir. 1982) addresses the issues of the use of an administrative subpoena rather than an administrative warrant or a search warrant. It most resoundingly does not.

Apparently the Sixth Circuit believed that the validity of the search in this case should depend not on the motivation of the inspector but on the scope of the search itself and the manner in which it is conducted. This misreads Acklan which appears to make the threshold inquiry as to whether there was sufficient probable cause for an administrative warrant under 21 U.S.C. Section 880. In fact the Court stated:

> "Consequently, we hold the warrant issued August 21, 1980 was valid in as much as it was based on an administrative showing of probable cause under 21 U.S.C. Section 880(d) and conducted in accordance with the statute." Id at 75.

However, in the instant case there was no showing of probable cause at any time. Unlike in Acklan, at no time was Petitioner given a Miranda warning as the defendant was in Acklan, at no time was an affidavit submitted in support for

application for an administrative warrant and at no time was there any review of the facts to determine any degree of probable cause whatsoever. Acklan, on the facts, is simply not applicable.

The Sixth Circuit's conclusion that the scope of the search was reasonable is equally inapposite as the subpoena requested all prescriptions in Schedule II through Schedule IV from 1985 through 1988 and all DEA 222 forms for the same period. Additionally, there seemed to be three items written in, by hand (by whom has not been determined). The scope is not reasonable under the Acklan or other tests. This information should be suppressed as evidence obtained in derogation of the Petitioner's Fourth Amendment Rights. To fail to do so is clearly error.

A. THE TRIAL COURT IMPROPERLY DETERMINED THAT THERE HAD BEEN CONSENT TO SEARCH.

There is insufficient evidence for the Court to conclude that there had been consent to the search in this case. Mr. Barenie testified at the time of the subpoena that the he identified himself and notified the Petitioner that he was serving an administrative subpoena for documents. The Petitioner " . . . was very cooperative and he would comply." The Court apparently concluded that 'consent had existed because the records were produced and the Petitioner did not demand to call his attorney. It is Petitioner's position that there is insufficient evidence on the record to conclude that consent had occurred. It also should be contended that consent to a subpoena (where the penalties including contempt for refusing to comply with the

subpoena are prominently printed on the document) cannot be transferred to a consent to search. A search based on consent requires more than a mere expression of approval to a search. "As a waiver of rights provided in the Fourth Amendment, a valid consent must be free and voluntary." Schneckloth v. Bustemonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L. Ed. 2d 854 (1973). The burden of proof for valid consent is on the government and requires "clear and positive" proof that the consent was uncontaminated by duress, coercion or trickery. U.S. v. Scott, 578 F. 2d. 1186, 1188-89 (6th Cir. 1978). When the government fails to meet its burden and the District Court's decision is not supported by substantial evidence, the finding is then considered clearly erroneous and thus should be reversed.

Consent must not only be proved by clear and positive testimony but must be "unequivocal, specific and intelligently given, uncontaminated by any duress or coercion." U.S. v. Hearn, 497 F.2d 236 (6th Cir. 1974). The knowledge of the right to refuse is highly relevant to the determination that there has been consent. U.S. v. Mendenhal, 446 U.S. 544, 558, 100 S.Ct. 1870, 1879, 64 L. Ed. 2d 497 (1980). The Sixth Circuit in this case found that consent that knowledge of the right to refuse is not determinative, but merely a factor in the totality. U.S. v. Susskind, 965 F. 2d. 80 (6th Cir. 1992).

However, both the Trial Court and the Court of Appeals found that production of the documents constituted consent. The Sixth Circuit Court of Appeals relied on U.S. v. Susskind, 965 F. 2d. 80 (6th Cir. 1992) to find that knowledge of a right to

refuse is not an essential element of effective consent. However, "the question of whether a consent to search was in fact voluntary or was the product of duress or coercion express or implied is a question of fact to be determined from the totality of all the circumstances." Schneckloth v. Bustemonte 412 U.S. 218, 227, 93 S.Ct. 2041, 2047, 36 L.Ed. 2d 854 (1973).

However, here there is no evidence of consent other than the mere production of the documents. Moreover, coercion can be implied from the subpoena itself which states "failure to comply with this subpoena will render you liable to proceedings in the District Court of the United States to enforce obedience to the requirements of this subpoena and to punish default or disobedience." It is difficult to think of any terminology that could be more coercive. Quite simply, the

government cannot demonstrate more than acquiescence to a claim of lawful authority with regard to the use of the subpoena nor is there any authority that consent or acquiescence to the service of a subpoena constitutes voluntary and knowledgeable consent to the search itself. The District Court and the Court of Appeals erred in concluding that this finding is not clearly erroneous.

II. THE COURT ERRED IN CALCULATING PETITIONER'S SENTENCE ON THE TOTAL WEIGHT OF THE PHARMACEUTICALS RATHER THAT WEIGHT OF THE ACTIVE INGREDIENTS WHICH WOULD HAVE JUSTIFIED THE SUBSTANTIAL DOWNWARD DEPARTURE FROM THAT RECOMMENDED BY THE PRE-SENTENCING REPORT.

As documented in the Statement of Fact, Petitioner's sentence was calculated in part on the alleged total weight of 1100 2mg Dilaudid tablets and 1204 mg Dilaudid tablets as well as an undefined

and unproven weight for Percodan and Tylenol IV tablets. The total weight was converted 548.005 grams of heroin equivalent. The conversion is an error first because the active ingredient within the Dilaudid tablets totaled 7 grams rather than the total weight which the government argues is 196 grams. Secondly, at no time during the course of the trial, in the pre-sentencing report or at the time of sentencing was there any evidence produced of the Percodan or Tylenol IV tablets. Application of the guidelines and other factors of sentencing is governed by 18 U.S.C. Section 3553(a). Seven factors are listed in considering imposing a sentence "sufficient but not greater that necessary to comply with the purposes set forth in paragraph (2) of this subsection." Id. Subsection (b) states:

> Application of guidelines in imposing a sentence. The court shall impose a sentence of kind and within the range referred to in subsection (a)(4) unless the court finds that there exist an aggravating or mitigating circumstance of the kind or of a degree not adequately taken into account by the Sentencing Commission and formulating a guideline that should result in a sentence different than that described. 18 U.S.C. Section 3553(b).

A recent Sixth Circuit interpretation, U.S. v. Davern, 937 F. 2d 1041 (6th Cir. 1991), determined that the Trial Court should first resort to subsection (a) and its seven factors rather than a mechanically application of base offense levels. The Court of Appeals acknowledged "`It is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision'" Id at 1048.

Here, the Trial Court apparently based its sentence on a recommendation of

the pre-sentencing report which allotted no weights to Percodan and Tylenol IV and used the entire weight of the tablets of Dilaudid rather than only the 2 or 4 mg of narcotic present in the tablets.

On Appeal, the Sixth Circuit Court of Appeals looked to U.S. v. Chapman, 111 S.Ct. 1919 (1991), which considered whether the blotter paper containing LSD is a "mixture of substance containing a detectable amount" for sentencing purposes. The Supreme Court found in that case that the Congress had a rational basis for its choice of penalties for LSD distribution as "it assigns more severe penalties to the distribution of larger quantities of drugs. By measuring the quantity of drugs according to `the street weight' of the drugs and the diluted form in which they are sold rather than according to the net weight of the active

component, the statute and sentencing guidelines increase the penalty for persons who possess large quantities of drugs regardless of their purity. That is a rational sentencing scheme." Id at 1928.

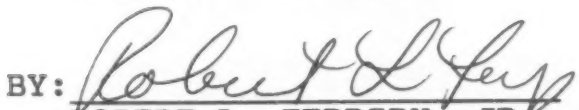
What is troubling about Chapman and associated cases is that these cases deal with street drugs rather than pharmaceuticals. Pharmaceuticals are marketed according to the active weight of the ingredient. It is manufactured by persons other than the Petitioner. The Petitioner has no opportunity to "dilute" the drug or effect the medium. The total weight of a tablet of pharmaceuticals is not a "tool of the trade" for those traffic in the drug. At this time neither Chapman, supra nor any case within this circuit or the Supreme Court has dealt with the issue of premixed pharmaceuticals

under these conditions. It is Petitioner's contention that the disparity in weight is mitigating circumstances that justified a larger downward departure from the guidelines. In the alternative, the lack of evidence as to the weight of Tylenol and Percodan should have removed those factors from consideration. To disregard these factors is error requiring reversal.

CONCLUSION

For these reasons the Court should issue a Writ of Certiorari to the Court of Appeals for the Sixth Circuit.

FERRIBY & HOUSTON

BY: 

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DATED: December 11, 1992.

Not For Publication

No. 91-2209

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JAMES ROGERS,

Defendant-Appellant.

_____/

BEFORE: NELSON, NORRIS, and SUHRHEINRICH, Circuit Judges.

PER CURIAM. Defendant James Rogers, a licensed Michigan pharmacist and owner of Sun Pharmacy, appeals his jury convictions on one count of conspiracy to distribute a controlled substance and twenty counts of distribution of controlled substances outside the course of legitimate pharmacy practice. The government charged that during an eight to nine month period in 1988, defendant

knowingly filled twenty-three phony prescriptions for Dilaudid, Tylenol IV, and Percodan. We AFFIRM.

I.

On August 25, 1988, agents of the Federal Bureau of Investigations surveilling an individual named George Thomas, observed him leave Sun Pharmacy, in Mt. Clemens, Michigan. The agents followed him back to Detroit at which time they stopped Thomas's vehicle. Thomas told the agents that he had just returned from Sun Pharmacy and that he purchased 200 Tylenol IV tablets; and that he purchased drugs from Sun Pharmacy on over 100 occasions. He agreed to make a controlled purchase of prescription drugs from Sun Pharmacy.

On the morning of September 2, 1988, Thomas made a controlled purchase of 100 Tylenol IV tablets and 100 Percodan tablets. The agents provided Thomas with a prescription for Percodan and ten one hundred dollar bills. Thomas paid the pharmacist seven one hundred dollar bills for the tablets.

Shortly thereafter, at approximately 10 a.m., David Wilson served an administrative subpoena at Sun Pharmacy. The agents gave defendant a copy of the subpoena, which required defendant to produce by 11 a.m. that day, any and all prescriptions from January 1985 to the present, and all orders and invoices for Schedule II drugs and DEA 222 for the same period. Defendant offered no resistance or objection and immediately turned over the requested items. The agents did not inform defendant that he was the subject

of a criminal investigation.

Defendant provided twenty-three prescriptions for Dilaudid, stating that each one had been brought in by Thomas. Rogers told Barenie that he charged Thomas ten dollars per Dilaudid tablet per four milligram tablet and five dollars per two milligram tablet. He also furnished Barenie with the seven hundred dollar bills that Barenie and Wilson had previously given Thomas.

All of the twenty-three prescriptions were written on the prescription pad of Dr. Vashna Gupta, M.D., and made out to the names of five different people. Gupta later testified that she did not write the prescriptions and that the five patients' names were not her patients. Three of the five patients also testified that these were not their prescriptions.

At the trial, the government introduced Thomas's confession through Special Agent Wilson. Both Wilson and Thomas testified as to Thomas's numerous dealings with defendant. At the time of trial, Thomas had already pled guilty and entered into a plea agreement with the government whereby he would testify in exchange for a maximum sentence of sixteen months.

Rogers was convicted on all counts July 11, 1991, after a jury trial. This appeal followed.

II.

A.

Defendant argues that the lower court erred in allowing Special Agent Wilson to testify that Thomas, upon his arrest, stated that he had purchased the controlled substances from Rogers, furthermore, that he had purchased pills

from defendant on prior occasions. Defendant maintains that the admission of the statements violated his Sixth Amendment right to confrontation as defined in Bruton v. United States, 391 U.S. 123 (1968) and his Fifth Amendment right to a fair trial.

Under Bruton, a non-testifying codefendant's incrimination pretrial confession at a joint trial violates the defendant's Sixth Amendment right to confrontation if it similarly implicates the defendant. Bruton, 391 U.S. 126. See also Richardson v. Marsh, 481 U.S. 200 (1987); Cruz v. New York, 481 U.S. 186 (1987). The right of confrontation includes the right of an accused on a criminal case to cross-examine the witness against him. Id; see also United States v. Gomez-Lemos, 939 F.2d 326, 333 (6th Cir. 1991) ("[w]ithout cross-examination

of a coconspirator, his confession incriminating a confederate is suspect and generally should not be admitted . . .").

In this case, Thomas did testify and was subject to cross-examination by defense counsel. Thus, Bruton is inapplicable.

B.

Defendant also contends that the district court impermissibly admitted "other crimes" under Fed. R. Evid. 404(b), by allowing "evidence that Thomas had illegally purchases prescription drugs from Rogers on over 100 occasions." The government responds that defendant has waived the issue.

Challenges to the admission of evidence must state "the specific ground of objection, if the specific ground is not apparent from the context." Fed. R. Evid. 103 (a)(1). "This rule serves to ensure that the nature of the error [is]

called to the attention of the judge, so as to alert him to the proper course of action and enable opposing counsel to take corrective measures." United States v. Gomez-Norena, 908 F.2d 497, 500 (9th Cir. 1990) (quoting Advisory Committee's Note to Rule 103(a), 56 F.R.D. 183, 195 (1972), cert. denied, 111 S. Ct. 363 (1990). A party fails to preserve an objection not only by failing to make a specific objection, but also by making the wrong objection. Id. (emphasis in original); United States v. Schrock, 855 F. 2d 327, 332-33 n.8 (6th Cir. 1988).

Here defendant objected to Thomas's testimony on a relevancy grounds, not Rule 404(b). Thus, we can only review for plain error. See Fed. R. Evid. 103(a) and (d). Plain error is error that "seriously affects the fairness, integrity on public reputation of judicial proceedings."

United States v. Young, 470 U.S. 1 (1985).

Although evidence of "other crimes" is inadmissible to prove the character of a person, such evidence may be admitted if it demonstrates "motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." Fed. R. Evid. 404(b); United States v. Paulino, 935 F.2d 739, 754 (6th Cir. 1991). In this case Thomas's testimony was offered to show an ongoing relationship between Thomas and Rogers, as well as the development of a conspiracy.

This circuit has repeatedly upheld the admission under Rule 404(b) of acts outside the time period of the indictment for the "legitimate purpose of showing the background and development of a conspiracy." Paulino, 935 F.2d at 755 (quoting United States v. Hitow, 889 F.2d 1573, 1578-79 (6th Cir. 1989) (citation

omitted); United States v. Passarella, 788 F.2d 377, 383 (6th Cir. 1986); United States v. Ismail, 756 F.2d 1253, 1259 (6th Cir. 1986). Similarly, we cannot say that the evidence was unduly prejudicial under Fed. R. Evid. 403. See United States v. Simmons, 923 F.2d 934 (2d Cir. 1991) (evidence of sale of heroin outside the indictment was admissible under rule 403 as background evidence in narcotics trial where evidence made it more probable that meeting between defendant and third person concerned additional sale of heroin). Finally, the trial court gave a limiting instruction as to the proper use of evidence immediately after the evidence was admitted.

C.

Defendant's next assignment of error relates to the lower court's ruling limiting defendant's cross-examination of Thomas concerning the terms of his plea agreement. The district court allowed defense counsel to cross-examine the witness as to the agreement, but refused to any questioning regarding specific sentencing concessions under the sentencing guidelines.

While the Confrontation Clause of the Sixth Amendment guarantees a criminal defendant the right to confront hostile witnesses, Delaware v. Van Arsdall, 475 U.S. 673, 678 (1986); the guarantee extends only "an opportunity for effective cross-examination not cross-examination in whatever way, and to whatever extent, the defense might wish." Id. at 679 (quoting Delaware v. Fernsterer, 474 U.S. 15, 20

(1985) (per curiam) (emphasis in original)). Thus a trial judge retains wide latitude to impose reasonable limits on such cross-examination. Id. Constitutional error does not occur unless "[a] reasonable jury might have received a significantly different impression of [the witness's] credibility had respondent's counsel been permitted to pursue his proposed line of cross-examination." Id. at 680; United States v. Martin, 920 F.2d 393, 396 (6th Cir. 1990) (en banc) ("Even in cases where an improper evidentiary ruling limits cross-examination, the test is `whether the jury had enough information, despite the limits placed on otherwise permitted cross-examination, to assess the defendant's theory.'" (quoting Dorsey v. Parke, 872 F.2d 163, 167 (6th Cir.), cert. denied, 110 S. Ct. 103 (1989)). This court has also stated that

when it is merely the extent of cross-examination that is limited, as opposed to limiting information presented in the jury, the trial judge retains a much wider latitude of discretion. Dorsey, 872 F.2d at 167. A district court's ruling in this regard are reviewed for abuse of discretion, although curtailment of defendant's cross-examination of a "star" government witness "must be more carefully scrutinized." Id. at 166.

The record reflects that defense counsel had ample opportunity to cross-examine Thomas. Thomas was questioned about his plea agreement, including the sentence he would receive and the fact that the government would not prosecute his other offenses. Furthermore, the trial court did not limit cross-examination on the extent of the plea agreement, but merely what the guidelines

would have been had Thomas pled guilty to the Dilaudid. Finally, defense counsel also questioned Thomas about his previous inconsistent statements and the fact that he lied to the investigating agents when first questioned by them. See United States v. Klauer, 856 F.2d 1147, 1149 (8th Cir. 1988). Thus, the jury had sufficient information despite limits on cross-examination, to assess the defense's theory. Martin, 920 F.2d at 396.

Finally, even if the court were to find that the trial court improperly limited cross-examination of Thomas, any such error is harmless beyond a reasonable doubt. See Van Arsdall, 475 U.S. at 684 (articulating factors a court should consider in assessing the degree of harm.)

D.

Defendant argues that the use of an administrative subpoena pursuant to 21 U.S. C. Section 876, rather than a judicial search warrant, violated his Fourth Amendment rights, since he was clearly the "target" of the investigation. Rogers also challenges the district court's finding as to consent.

In United States v. Acklen, 690 F.2D 70 (6th Cir. 1982), we considered "whether the evidence seized pursuant to an administrative inspection warrant . . . should be suppressed . . . if the primary purpose of the administrative inspection search was to obtain evidence for criminal prosecution." Id. at 72*. We held that

*United States v. Herrington, 761 F.2d 1482 (11th Cir. 1985), cited by defendant, is distinguishable from Acklen and the instant case because it concerned administrative subpoenas issued to third parties post indictment.

the motivation of the agents in serving the administrative warrants was irrelevant in the Fourth Amendment analysis since the agents would be authorized to investigate absent suspicion. Id. at 74-75. United States v. Nechy, 827 F.2d 427, 432 (2d Cir. 1985); cert. denied, 474 U.S. 1060 (1986); In re Searches & Seizures Conducted on October 2 and 3, 1980, 665 F. 2d 775 (7th Cir. 1981); see also United States v. Consolidation Coal Co., 560 F.2d 214, 220 (6th Cir. 1977), (mining industry), vacated and remanded, 436 U.S. 942 (1978) (for further consideration in light of Marshall v. Burlow's Inc. and Michigan v. Tyler), judgment reinstated, 579 F.2d 1011 (6th Cir. 1978), cert. denied, 439 U.S. 1069 (1979); United States v. Goldfine, 538 F.2d 815, 818-19 (9th Cir. (1976) (citing Colonnade Catering Corp. v. United States, 410 F.2d

197, 205 (2d Cir. 1969), rev'd on other grounds, 397 U.S. 72 (1970)). The Acklen court reasoned that the pharmaceutical industry, "is a pervasively regulated industry and consequently pharmacists and distributors subject to the Controlled substances Act have a reduced expectation of privacy in the records kept in compliance with the Act." Id.*

*Given this holding in Acklen, defendant's reliance on United States v. Lawson, 502 F. Supp. 158 (M.D. 1980) and United States v. Anile, 352 F. Supp 14 (N.D. W. Va. 1973), which both involve the use of administrative warrants, is misplaced.

Therefore, the traditional judicial probable cause requirement did not apply to administrative warrants.

Although Acklen involved administrative warrants which require some level or probable cause, as opposed to the Section 876 administrative subpoena at issue here which requires merely a finding of relevancy versus materiality, the distinction does not require of relevance versus materiality, the distinction does not require a different result under the rationale of Acklen, since the agents were clearly permitted to execute the subpoena absent suspicion. Thus, all that is relevant is "the scope of the search and the manner in which it is conducted." Acklen, 690 F.2d at 74. The record reflects that the agents limited their request to the materials listed on the subpoena. They did not conduct a search

that took nothing outside the items listed in the subpoena. The district court found that Rogers personally retrieved the items and did not object. Rogers was under no legal compulsion to comply with the administrative subpoena. — It is well established that absent intervention by a court, production of items listed in and administrative subpoena is not legally compulsory. See Richard A. Vaughn, D.D.S., P.C. v. Baldwin, 950 F.2d 331, 333 (6th Cir. 1991), and cases there cited.

As for consent to the search, defendant maintains that the record does not support the district court's finding that Rogers gave his consent to the officers. Further, defendant contends that consent to a subpoena cannot be transferred to a consent to search.

As to defendant's legal contention, we note that the Supreme Court has refused to hold that the knowledge of a right to refuse is an essential element of an effective consent. See Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973); United States v. Susskind, 965 F.2d 80 (6th Cir. 1992). Thus, it has been held that the mere fact that agents secured records after presenting a subpoena, without specifically informing the defendant of his legal rights regarding the subpoena, is not determinative, but merely the factor in the totality. Susskind; United States v. Allison, 619 F.2d 1254 (8th Cir. 1980); see also Consumer Credit Ins. Agency v. United States, 599 F.2d 770 (6th Cir. 1979), cert. denied, 445 U.S. 903 (1980) (upholding forthwith grand jury subpoena duces tecum against a Fourth Amendment

challenge).

Furthermore, the trial court's finding of consent is supported by the record. Agent Barenie testified that Rogers consented to cooperate from the outset; voluntarily handed the agents money used in the controlled purchase, voluntarily retrieved the items listed on the subpoena, and freely discussed his involvement in illegal activities. Thus, upon review, it cannot be said that the lower court's finding is clearly erroneous. Schneckloth, 412 U.S. 218.

E.

Lastly, defendant asserts that the trial court erred as to the degree of the downward departure from the sentencing guidelines. Specifically defendant maintains that the district court should have departed further than eight months, because the guideline range was determined

by the total weight of the Dilaudid tablets, rather than the weight of the active ingredients alone.

Defendant has waived this issue on appeal. At sentencing, defendant argued only that the court should consider the weight of the active ingredient alone in determining the appropriate guideline range and made no similar objection regarding a downward departure. See Fed. R. Evid. 103(4); Fed. R. Crim. P. 51; Schrock, 855 F.2d at 332-33 n.8.

In any event, defendant's position has been squarely rejected by both the Supreme Court and this circuit. United States v. Chapman, 111 S. Ct. 1919, 1925 (1991) (blotter paper used to distribute LSD is a "mixture of substance containing a detectable amount" of LSD, since like cocaine or heroin mixed with cutting agents LSD cannot be distinguished or

easily separated from it; therefore total weight is to be used for sentencing purposes); United States v. Williams, 894 F.2d 208, 214-15 (6th Cir. 1990) (in measuring the quantity of cocaine under sentencing guidelines, the entire mixture was considered, despite the fact that amount was only 87% pure cocaine); see also Andress, 943 F.2d 622 (6th Cir. 1991) (weight of blotter paper as well as pure LSD included for purposes of calculating guidelines sentence); United States v. Elford. 898 F.2d 60 (6th Cir.) (same) cert. denied, 111 S. Ct. 104 (1990); cf. United States v. Jennings, 945 F.2d 129 (6th Cir. 1991) (a crockpot containing a small amount of methamphetamine and poisonous by-products could only be weighted relative to the amount of methamphetamine intended for ingestion); clarified by, 966 F.2d 184 (6th Cir.

1992). While Section 2D1.1 of the Sentencing Guidelines provides for exceptions, Dilaudid is not listed as one.

For all the foregoing reasons, defendant's conviction is AFFIRMED.

ISSUED AS MANDATE: 10-08-92

LEONARD GREEN, Clerk

By Sharon R. Fallaigo, Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA,

V.

JAMES ROGERS, R.Ph.,
defendant.

Stephen T. Rabaut and Robert L. Ferriby, Jr., Defendant's Attorney

JUDGMENT IN A CRIMINAL CASE

Case Number: 90-CR-80809-01
Honorable Robert E. DeMascio

THE DEFENDANT:
plead guilty to count(s) _____

XX was found guilty on count(s) One Through Twenty-one after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

-21:USC:846	Conspiracy with to Distribute Controlled Substance	
	Date offense concluded: 9/2/88	
	Count #: One	

-21:USC:841(a)(1)	Distribution of Schedule II Controlled Substances
	Date offense concluded: 9/2/88
	Count #: 2 - 19
-21:USC:841(a)(1)	Distribution of Schedule III Controlled Substances
	Date offense concluded: 9/2/88
	Count #: 20 & 21

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

XX It is orderd that the defendant shall pay a special assessment of $1,050.00 for Count(s) 1 through 21, which shall be due immediately.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 377-50-7049

Defendant's Date of Birth: March 4, 1947

Defendant's Mailing Address:

29617 City Center Drive
Warren, MI 48093

Defendant's Residence Address: Same as above

Date of Imposition of Sentence:

October 8, 1991

Robert E. DeMascio
United States District Judge

Dated: 10/10/91

Defendant: James Rogers, R.Ph.
Case Number: 90-80809-01

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of eighty-seven (87) months each, as to Counts One through Nineteen, to run concurrently with each other and sixty (60) months each, and to Counts Twenty and Twenty-one, to run concurrently with each other and with the custody term on Counts One through Nineteen.

XX The defendant shall surrender to the United States marshal for this district by 2:00 p.m. on Friday, October 18, 1991.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of three (3) years, as to each Court, One through Twenty-one, to run concurrently with each other.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court. If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the

commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

XX The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

XX The defendant shall not possess a fire arm or destructive device.

XX The defendant is prohibited from employment as a Pharmacist.

XX The defendant shall pay the costs of Supervised Release in the amount of $96.66 per month during the term of Supervised Release.

STATEMENT OF REASONS

XX The court adopts the fatal findings and guideline application in the presentence report.

Guideline Range Determined by the Court:

Total Offense Level: 30

Criminal History Category: I

Imprisonment Range: 97 to 121 mos.

Supervised Release Range: 3 to 5 yrs.

Fine Range: $15,000.00 to $19,000.00
XX Fine is waived or below the guideline range, because of the defendant's inability to pay.

XX The sentence departs from the guideline range for the following reason(s):

Defendant's live and background warrant more consideration than guidelines press upon it. Defendant's history indicates the will not be before the Court again

U.S. DEPARTMENT OF JUSTICE/FEDERAL
BUREAU OF INVESTIGATION

SUBPENA

In the matter of the investigation of

209A-716

TO: Sun Pharmacy
35035 Harper
AT: Clinton Township, Michigan
Attn: James Rogers

GREETING:

By the service of this subpoena upon you by Special Agent Robert S. Barenie who is authorized to serve it, you are hereby commanded and required to appear before Robert S. Barenie, an officer of the Federal Bureau of Investigation to give testimony and to bring with you and produce for examination the following books, records, and papers at the time and place hereinafter set forth:

Any and all prescriptions (Schedule II - IV) from January, 1985, to the present; all orders and invoices re Schedule drugs and DEA 222 Forms re Schedule II drugs for the same period.

Place and time for appearance:

At **477 Michigan Avenue, 26th Floor, Detroit, Michigan 48226** on the **2nd** day of **September, 1988** at **11 o'clock a.m.**

Failure to comply with this subpoena will render you liable to proceedings in the district court of the United States to enforce obedience to the requirements of this subpoena, and to punish default or disobedience.

Issued under authority of Sec. 506 of Comprehensive Drug Abuse Prevention and Control Act of 1970, Public Law No. 91-513 (21 U.S.C. 876)

Signature: Anthony T. Riggio

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA)
)
v.)
)
RODGERS, JAMES R. Ph.)

Docket # 90-CR-80809-DT

PRESENTENCE REPORT

Prepared For:	The Honorable Robert E. DeMascio, United States District Judge
Prepared By:	Barbara A. Feril United States Probation Officer, (313) 226-2047
Office Location:	Detroit, Michigan
Sentencing Date:	
Offense/Penalty:	Count 1, 21:USC:846 and 841(a)(1), Conspiracy to Distribute Controlled Substances, Hydromorphone (Dilaudid), a Schedule II Controlled Substance, Codeine Phosphate Acetaminophen (Tylenol

#4), a Schedule III Controlled Substance, Oxycodone (Percodan), a Scheduled II Controlled Substance, a Class B. Felony, 20 years and/or $1,000,000.00 fine, at least three years supervised release, special assessment of $50.00.

Counts 2 - 18, 21:USC:841(a)(1), Distribution of Hydromorphone (Dilaudid), a Scheduled II Controlled Substance, a Class B. Felony, 20 years and/or $1,000,000.00 fine, at least three years supervised release, special assessment of $50.00.

Count 19, 21:USC:841(a)(1), Distribution of Oxycodone (Percodan), a Scheduled II Controlled Substance, a Class B. Felony, 20 years and/or $1,000,000.00 fine, at least three years supervised release, special assessment of $50.00

	Counts 20 and 21, 21:USC841(a)(1), Distribution of Codeine (Tylenol #4), a Scheduled III Controlled Substance, a Class D Felony, five years and/or $250,000.00 at least two years supervised release, special assessment of $50.00
Date of Arrest:	October 5, 1990
Custodial Status:	October 5, 1990, $50,000.00 unsecured bond.
Identifying Data:	
Date of Birth:	March 4, 1947 (Age 44)
Race:	Caucasian
Sex:	Male
Citizenship:	United States
Education:	Four years college
Dependents:	Two (Wife, Stepdaughter)
Social Sec. No.:	377-50-7049
Other I.D. Number:	MDL# R-262-367-745-167
FBI Number:	Not returned
U. S. Marshall #:	14296-039
Legal Address:	29617 City Center Drive Warren, Michigan 48093
Detainers:	None
Other Defendants:	George Thomas, docket 90-CR-80937-DT-01, Judge Gerald E. Rosen,

January 23, 1991 pled guilty to Count 1 of the Information, Possession With Intent to Distribute Controlled Substance, Tylenol with CoDeine, a Schedule III Controlled Substance. Rule 11: Custody not to exceed 16 months; awaiting sentence.

Assistant U.S. Attorney
Lawrence E. Spong
Controlled Substance Unit
231 W. Lafayette
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Detroit, Michigan 48226
(313) 226-3988

Defense Counsel (Retained)
Stephen T. Rabaut
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(313) 776-1110

Date Report Prepared: August 14, 1991

Date Report Revised: September 11, 1991

Mandatory Minimum

PART A. THE OFFENSE

Charge(s) and Conviction(s)

1. JAMES RODGERS, R.Ph., was charged in 21 counts of a 21 count Indictment filed in the Eastern District of Michigan on September 27, 1990. Count 1 charges Conspiracy to Distribute Hydromorphone (Dilaudid), a Scheduled II Controlled Substance, Codeine Phosphate Acetaminophen (Tylenol #4)a, a Scheduled III Controlled Substance, and Oxycodone (Percodan), a Scheduled II Controlled Substance, 21:USC:846; Counts 2 through 18 charge Distribution of Oxycodone (Percodan), a Scheduled II Controlled Substance, 21:USC:841(a)(1); Count 19 charges Distribution of Oxycodone (Percodan), a Scheduled II Controlled Substance, 21:USC:841(a)(1); Counts 20 and 21 charge Distribution of Codeine (Tylenol #4), a Scheduled III Controlled Substance, 21:USC:841(a)(1). According to the Indictment, the offense took place from on or about January, 1988 until September 2, 1988.

2. On October 5, 1990, the defendant appeared before the United States Magistrate Judge with counsel and was arraigned on the 21 count indictment. He entered a plea of not guilty to Counts 1 through 21 and a $50,000.00 unsecured bond was set.

3. On July 9, 1991, a jury was impaneled and a trial began.

4. On July 11, 1991, the jury returned a verdict of guilty to Counts 1 through 21.

5. Count 1 charges that on or about January, 1988 and continuing up to and including September 2,1 988, defendant Rodgers, Registered Pharmacist and unindicted co-conspirator George Thomas, did unlawfully conspire to distribute Hydromorphone (Dilaudid), a Scheduled II Controlled Substance, Codeine Phosphate Acetaminophen (Tylenol #4), a Scheduled III Controlled Substance, and Oxycodone (Percodan), a Scheduled II Controlled Substance, in violation of 21:USC:846 and 841(a)(1).

6. Counts 2 through 18 charge that from January 13, 1988 until August 27, 1988, defendant Rodgers distributed Hydromorphone (Dilaudid), a Scheduled II Controlled Substance, in violation of 21:USC:841(a)(1).

7. Count 19 charges that on or about September 2, 1988, defendant Rodgers did unlawfully distribute Oxycodone (Percodan), a Scheduled II Controlled Substance, in violation of 21:USC:841(a)(1).

8. Counts 20 and 21 charge that on August 25, 1988 and September 2, 1988, defendant Rodgers did unlawfully distribute Codeine (Tylenol #4), a Scheduled III Controlled Substance, in violation of 21:USC:841(a)(1).

9. The sentencing guidelines used in the calculation of this offense are those in effect on the date that the offense was committed.

Related Cases

10. None

The Offense Conduct/Victim Impact

11. The following information was obtained through the Assistant United States Attorney that prosecuted this case.

12. On August 25, 1988, George Thomas was stopped by Federal Bureau of Investigation (FBI) agents while driving in Detroit, Michigan. Thomas admitted to having purchased 200 Tylenol #4 with Codeine from Jim, the pharmacist at Sun Pharmacy, Mt. Clemens, Michigan. Thomas agreed to make a controlled purchase of prescription drugs from the pharmacist at Sun Pharmacy.

13. On September 2, 1988, Thomas made the controlled purchase of 100 Tylenol #4 tablets and 100 Percodan tablets. The FBI agents provided Thomas with a prescription for the Percodan tablets and ten, one hundred dollar bills for purposes of the purchase. Thomas paid the pharmacist seven hundred dollars for the Tylenol and Percodan.

14. Shortly after the controlled purchase, Special Agents from the FBI, served an administrative subpoena at Sun Pharmacy. A copy of the subpoena was given to James Rodgers, the owner and pharmacist at Sun Pharmacy. The agents told Rogers that they had obtained the Tylenol #4 tablets and Percodan tablets from George Thomas, and asked Rogers for his cooperation. Rogers reached into his pocket and handed the agents the seven, one hundred dollar bills which Thomas had used to purchase the Tylenol and Percodan.

15. Rogers was then asked to provide the items listed on the subpoena. Rogers stated he wished to be truthful and admitted that Thomas received all the Dilaudid tablets which Rogers ordered for Sun Pharmacy. Rogers provided the agents with the items listed on the subpoena. He also admitted selling the Dilaudid to Thomas for ten dollars per four milligram tablet and five dollars per two milligram tablet.

16. Twenty-three prescriptions for Dilaudid were found on a prescription spindle all allegedly written by Dr. V. Gupta, M.D. Rogers stated he had verified one of the prescriptions only. Rogers was also shown a surveillance photograph and identified George Thomas.

17. Rogers was not placed under arrest at any time during the encounter. All evidence obtained was retrieved by Rogers and given to the FBI agents who served the subpoena.

18. A total of 1100 2mg. Dilaudid tablets and 1200 4mg. Dilaudid tablets were distributed by Mr. Rogers. A 2mg. Dilaudid tablet weighs 88 mgs. and a 4mg Dilaudid tablet weight 90 mgs. Invoices and DEA 222s showed that Mr. Rogers had ordered all 2300 Dilaudid tablets through normal pharmacy and DEA procedures. The Dilaudid tablets, Percodan tablets and Tylenol #4 tablets are converted to 548.005 grams of heroin equivalent. Mr. Rogers had access to such drugs only because of his license as a pharmacist.

PART B. THE DEFENDANT'S CRIMINAL HISTORY

Criminal Convictions

19. None.

Criminal History Computation

20. The defendant has a criminal conviction record resulting in a total of zero criminal history points. According to the sentencing table (Chapter 5, Part A), zero to one criminal history point places James Rogers in a criminal history category of I.

Other Criminal Conduct

21. None.

Pending Charges

22. None.

PART C. OFFENDER CHARACTERISTICS

Family Ties, Family Responsibilities, and Community Ties

23. The defendant indicated he is the youngest of three sons born to Daniel Rogers and Margaret (Nee: Kuzel) Rogers on March 4, 1947 in Detroit, Michigan. The defendant indicated his father supported their family working as a Detroit Police Officer. The defendant stated his father is now retired after 25 years on the Detroit Police Department. He reported that his father worked for First Federal Savings subsequent to his retirement as a police officer. Rogers explained his mother was an employee of Chrysler Credit Corporation. He indicated she is also retired. He stated that neither of his brothers have prior criminal records. His brothers are: Daniel Rogers and Kenneth Rogers.

24. Rogers related that he married Ruth Ann Stevenson on June 8, 1974 in Macomb County, Michigan. He stated they were divorced in August, 1979 and remarried in August, 1983. The defendant and his wife do not have any children. His wife has two children from a previous marriage. They are: Randall Barkley, age 29 and Tammy Barkley, age 24. The defendant explained that he helped

raise and support both children and Tammy Barkley still lives with the defendant and his wife.

25. Numerous letters of recommendation have been received and are available for the Court's review.

Mental and Emotional Health

26. The defendant said he has never been treated by a mental health professional.

Physical Condition, Including Drug Dependence and Alcohol Abuse

27. The defendant stands 6'3" tall, weighs 190 pounds, possesses brown hair and hazel eyes. He has a scar on his right side from appendix surgery.

28. Rogers indicates he is in good health at the present time and had never suffered any serious diseases or illnesses in the past.

29. The defendant said he has never used any illegal drugs such as cocaine, heroin, or marijuana. A urine sample collected on July 16, 1991 was returned negative for illegal substances.

30. The defendant advised that he uses alcohol very seldom.

Education and Vocational Skills

31. Rogers graduated from Cass Technical High School in Detroit, Michigan on June 25, 1965.

32. The defendant attended Highland Park Community College in Highland Park, Michigan from September, 1965 until June, 1966. He was readmitted July 8, 1968 and continued until June, 1969.

33. Rogers attended Wayne State University from September, 1969 until the summer of 1970.

34. Rogers earned a Bachelor of Science in Pharmacy Degree from Ferris State College on May 18, 1974.

35. The defendant holds a Registered Pharmacist License and a Controlled Substance License through the State of Michigan Department of Licensing and Regulation. Both license expire June 30, 1993. He is also a licensed pharmacist through the Arizona State Board of Pharmacy and this license expires June 30, 1992.

Employment Record

36. The defendant indicated he has been employed as a pharmacist with the Kroger Company from September, 1990 until the present. A copy of a paycheck stub dated July 13, 1991 indicated a net pay of $2,644.58. The defendant indicated he is paid on a monthly basis with a year to date

net pay of $18,421.85. He also provided a paycheck stub dated December 9, 1990 indicating a year do date gross pay of $13,004.98 from the Kroger Company. The defendant explained that he has been promoted to pharmacy manager at the Bloomfield Hills Kroger Store.

37. At the time of the instant offense, the defendant was employed as the owner and pharmacist at Sun Drugs in Clinton Township, Michigan. He stated he owned this business from January, 1988 until August, 1990. The defendant explained that he filed Chapter 11 Bankruptcy in May, 1990 and subsequently filed Chapter 13 Bankruptcy in October, 1990 for Sun Drugs Incorporated.

38. The defendant indicated employment as a pharmacist with Holiday Pharmacy in Clinton Township, Michigan from May, 1987 until 1988.

39. Rogers was employed as a staff pharmacist with Fry's Food and Drug in Phoenix, Arizona from January 27, 1986 until March 29, 1987. The defendant terminated this employment because he moved back to Michigan.

40. The defendant stated he was employed as a pharmacist by the For Profit Pharmacy at Scottsdale Memorial Hospital in Scottsdale, Arizona from October, 1985 until January, 1986. A verification received from Scottsdale Memorial Hospital indicates their records do not reflect a James Robert

Rodgers having worked in their system.

41. Rogers stated he was employed as the owner and pharmacist at Village Pharmacy in Warren, Michigan from 1982 until 1985.

Military Service

42. The defendant explained that he was in the United States Army from 1966 until 1968. He indicated he served in the Active Reserves from 1968 until 1970 and the Inactive Reserves from 1970 until 1972. Rogers received an Honorable Discharge from the United States Army on July 7, 1972.

PART D. FINANCIAL CONDITION

Defendant's Ability to Pay

43. The following information was provided by the defendant. He did not supply copies of his federal income tax returns.

Assets

Cash	$50.00
Unencumbered Assets	$ -0-
Equity in Other Assets	$ -0-
TOTAL ASSETS	$50.00

Unsecured Debts

Visa	$2,200.00
Security Bank of Commerce	$950.00
TOTAL UNSECURED DEBTS	$3,150.00

Net Worth	($3,100.00)

Sources of Monthly Net Income

Employment	$2,560.00
TOTAL INCOME	$2,560.00

Monthly Necessary Living Expenses

Rent	$795.00
Electric	$ 60.00
Gas	$ 60.00
Telephone	$ 70.00
Groceries	$600.00
Auto Insurance	$194.00
Life Insurance	$ 55.00
Transportation	$450.00
Clothing	$160.00
Visa	$137.00
Security Bank of Commerce	$ 40.00
TOTAL NECESSARY LIVING EXPENSES	$2,621.00

Net Monthly Cash Flow	($ 61.00)

44. The defendant indicated he sold his 1985 Corvette in March, 1990 and received $15,000.00. He also indicated he sold a 1985 Chrysler Fifth Avenue in October, 1990 and received $8,000.00 The defendant indicated this money was used for attorney fees.

45. The defendant explained that he filed business bankruptcy for Sun Drugs Incorporated (the pharmacy involved in this instant offense). He explained that his residence at 39696 Tunstall in Mt. Clemens, Michigan is in foreclosure proceedings due to a second mortgage he took when purchasing Sun Drugs Incorporated.

PART E. COMPUTATIONS

Offense Level Computation

Counts 1 through 21 - Conspiracy to Distribute and to Distribute Hydromorphone (Dilaudid), Codeine (Tylenol #4), and Oxycodone (Percodan)

46. Base Offense Level: The guideline for 21:USC:846 (Conspiracies 2D1.4) directs that the offense level shall be the same as the object of the conspiracy. The guideline for 21:USC:841(a)(1) is located in Section 2D1.1(a)(3). The base offense level is 28 for 548.005 grams of heroin equivalent.

28

47. Specific Offense Characteristics: None. 0

48. Victim Related Adjustment: None. 0

49. Adjustment for Role in the Offense: The defendant's offense level is increased by two levels under Section 3B1.3 because the defendant used a special skill in a manner that significantly facilitated the commission of this offense. The defendant's position as a licensed pharmacist enabled him to have access to controlled substances. +2

50. Adjustment for Obstruction of Justice: None. 0

51. Adjusted Offense Level, Counts 1 through 21 (subtotal): 30

Multiple Count Adjustment

52. Counts 1 through 21 of the Indictment are grouped pursuant to 3D1.2(d) because the offense level is based on the quantity of substance involved.

Group 1 (Counts 1 through 21)

53.	Adjusted Offense Level 30	Units 1
54.	Total Number of Units . . .	1
55.	Greater of the Adjusted Offense Levels Above	30
56.	Increase in Offense Level (3D1.4)	0
57.	Combined Adjusted Offense Level.	30

58. Adjustment for Acceptance of Responsibility: Under Section 3E1.1, the defendant is not entitled to a two level reduction because he denies his guilt in this offense. He did not discuss this offense with the Probation Department upon the advice of his counsel.

59. Total Offense Level: 30

PART F. SENTENCING OPTIONS

Custody

STATUTORY PROVISIONS:

60. Counts 1 through 19: The maximum term of imprisonment for each offense is 20 years. 21:USC:841.

61. Counts 20 and 21: The maximum term of imprisonment for each offense is five years. 21:USC:841.

GUIDELINE PROVISIONS:

62. Based on a combined total offense level of 30 and a criminal history category of I, the guideline imprisonment range is 97 to 121 months.

Supervised Release

STATUTORY PROVISIONS:

63. Counts 2 through 19: At least three years, each count. 21:USC:841.

64. Counts 20 and 21: At least two years, each count. 21:USC:841

65. All terms of supervised release run concurrently. 18:USC:3624.

GUIDELINE PROVISIONS:

66. Counts 2 through 21: At least three years, each count, but not more than five years for a defendant convicted under a statute that requires a term of supervised release. 5D1.2(a).

Probation

STATUTORY PROVISIONS:

67. Counts 1 through 19: The defendant is not eligible for probation. 18:USC:3561(a)(1).

68. Counts 20 and 21: The defendant is not eligible for probation. 18:USC:3561(a)(3).

GUIDELINE PROVISIONS:

69. Since the lower end of the guideline range exceeds six months, the defendant is ineligible for probation. 5B1.1(a)(2).

Fines and Restitution

STATUTORY PROVISIONS:

70. Counts 1 through 19: The maximum fine is $1,000,000.00, each count. 21:USC:841.

71. Counts 20 and 21. The maximum fine is $250,000.00, each count. 18:USC:3571.

72. A special assessment of $50.00 is mandatory on each count. 18:USC:3013.

73. The restitution provision of the Victim and Witness Protection Act does not apply in this case.

GUIDELINE PROVISIONS:

74. The fine range for Counts 1 through 21 is $15,000.00 to a maximum of $19,000.00. 5E1.2.

75. Subject to the defendant's ability to pay, the Court shall impose an additional fine amount that is at least sufficient to pay the cost to the government of any imprisonment, probation, or supervised release. 5E1.2(i). The most recent advisory form the Administrative Office of the United States Courts dated April 30, 1990, suggests that a monthly cost of $1,415.56 may be used for imprisonment, a monthly cost of $957.27 for halfway houses, and $96.66 for supervision costs.

PART G. FACTORS THAT MAY WARRANT DEPARTURE

76. None.

PART H. IMPACT OF PLEA AGREEMENT

77. There is not a plea agreement in this case. The defendant was convicted after a jury trial.

Respectfully submitted,

RAYMOND L. FRANK, JR., CHIEF
UNITED STATES PROBATION OFFICER

BY:

Barbara A. Feril
United States Probation Officer

Reviewed and Approved:

William R. Blanchard, Supervising
United States Probation Officer

BAF:jh